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ABSTRACT

What is the nature and function of case law in our legal system? How are legal case histories used to establish precedent and to assist in the application of legal principles to specific cases? These and other questions are addressed in this examination of the potential of using a basic case structure in educational evaluation similar to that used in American law. Evaluation case histories might be valuable as examples of how to do evaluations, as precedents, or as a means to accumulate knowledge and experience about evaluation. The differences between an evaluation report and an evaluation case history are outlined: an evaluation case history would be shorter, more accessible, written for the practicing evaluator, and would provide explanation and justification for the evaluator's action. An evaluation case history should include the procedural history, the facts of the case, the issues, the conceptual principles, and the decision. (Author/BW)

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No. 24 EVALUATION CASE HISTORIES AS A

PARALLEL TO LEGAL CASE HISTORIES

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PREFACE

The Research on Evaluation Program is a Northwest Regional Educational Laboratory project of research, development, testing, and training designed to create new evaluation methodologies for use in education. This document is one of a series of papers and reports produced by program staff, visiting scholars, adjunct scholars, and project collaborators--all members of a cooperative network of colleagues working on the development of new methodologies.

What is the nature and function of case law in our legal system? How are legal case histories used to establish precedent and to assist in the application of legal principles to specific cases? These and other questions are addressed in this report which examines the potential of using a basic case structure in educational evaluation similar to that used in American law. Conditions necessary for the use in evaluation of case histories similar to legal case histories are also treated in this report.

Nick L. Smith, Editor
Paper and Report Series

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EVALUATION CASE HISTORIES
AS A PARALLEL TO LEGAL CASE HISTORIES

INTRODUCTION

This document represents an attempt to translate the notion of case histories from the law to evaluation. What is the potential value of this? Three reasons why evaluation case histories might be valuable are given in Part II A. Firstly, evaluation case histories might serve as examples of how to do evaluations. Secondly, in some circumstances, evaluation case histories could act as precedents. Thirdly, evaluation case histories might serve as a means to accumulate knowledge and experience about evaluation. We would like to make it clear to the reader that this document does not advocate a new method for doing evaluations.

There are two parts to this document. Part I is purely a discussion of law. It describes the use of case histories in the law. For those persons quite familiar with law it could be skipped. Those persons with no familiarity will find that Part I presumes no prior knowledge. Part II tries to envision the nature and use of evaluation case histories as a parallel to legal case histories.

PART I: LEGAL CASE HISTORIES

A. CASE HISTORY AS LAW

Surely no profession makes more extensive use of case histories than does the legal profession. Legal case histories are deliberately structured and highly formalized; moreover, they are efficiently reported and recorded. The predominate indexing system applied, although imperfect, is remarkably useful to the practitioner. For one who wishes to examine the real, practical application of recorded case histories to novel, unresolved problems, the common law legal tradition offers a superlative paradigm.

It must be particularly emphasized at the outset that the use of case histories in the law has evolved in its own peculiar fashion to meet the particular needs of that system. The same can of course be said for the investigative and the recording tools of other professions: case studies in anthropology, controlled experiments and observation in psychology and the physical sciences, and so on. With the law, however, there is a fundamental difference in focus and purpose. In the common law tradition of Great Britian and the United States, decided cases <u>are</u> the law, in a more direct, concrete, and fundamental way than, for example, case studies could every <u>be</u> anthropology.

The Law, writ large and spoken of in reverential terms, is conceived by members of the profession as a set of principles, of varying levels of generality and abstraction, which are applied to particular, specific facts and leading then to a result in accord with those principles. The source of those principles is two-fold: prior court decisions and legislation. That is to say, there is both case law and statutory law. Even so, there can be no hard and fast line drawn between these two sources of law, since statutes themselves are, of necessity, general and abstract. It is frequently unclear whether a particular statute applies to a concrete factual situation in the first place and, if so, how it applies and to what result. In short, statutes themselves must be interpreted and construed by the courts with regard to particular facts. Statutory construction is itself subject to established guidelines for judicial decision. Since statutes must be interpreted by the courts in particular cases, we come again to the proposition that, even where statutes are involved, reported case decisions <u>are</u> the law.

The concept of precedent is fundamental to any understanding of case decision as law. Courts are bound by precedent. Under the United States' federal system of government, each state has its own judicial system, while the federal government likewise has a system of courts. Both the state and the federal courts are arranged in tiers. That is, a given legal dispute is heard first by the trial court, where evidence is taken, and may thereafter proceed to various courts of appeals. The Supreme Court of the United States is the highest court for the federal system and for the state systems in cases implicating the United States Constitution. Each state's own supreme court is the final authority on matters concerning state statutory, constitutional, and common law. The

judges of any court, at whatever level and of whatever system, are bound by the prior decisions of their own court and by the prior decisions of higher courts within their own system. If a state intermediate court of appeals does not correctly apply the principles expounded in its own prior cases, its result in a given case may well be reversed on further appeal to the state supreme court. Similarly, should a federal trial judge not follow the directive given by prior decisions of the applicable Circuit Court of Appeals, his decision will be reversed on appeal. As a general rule, courts are not bound to follow the decisions of courts of other systems. For example, a Michigan judge need take no notice of the result of a similar case decided in New York state courts. The Michigan court may, if it chooses, refer to the New York decision because of its persuasive logic and policy; if it chooses not to do so, however, its decision will not be reversed on that ground.

The reasons for the development of the precedential system of legal decision making are grounded both in justice and in economy. One simple and fundamental definition of justice is that people in similar circumstances should be treated similarly. Like factual circumstances should lead to like results. The binding effect of precedent is thought to facilitate even-handedness, equality of treatment by the courts. It is simply not permitted that Mr. Smith be treated differently from Ms. Jones when both have been placed in the same situation. Moreover, adherence to precedent conserves judicial energy; it permits the court to rely on the work of those before it. Solutions to both simple and complex problems need not be developed afresh for each new case. Rather, principles are developed and applied to <u>concrete</u> but recurring fact patterns.

This means, of course, that the law is necessarily and fundamentally conservative. The ancient expression of a legal principle may have binding force and application today. The binding effect of precedent on courts does not mean that a rule of law can never change. On occasion a court will explicitly overrule a prior legal principle because of changed circumstances and policies which make its continued application no longer feasible or desirable. In other instances a rule of law will simply lapse into disuse from its failure to meet the demands of changed situations. Legal principles are intended to be a system of logic and order. Accordingly, the law fails when gaps develop between the theoretical system and the factual reality. The courts must frequently struggle with the inadequacy of principles developed in 18th century situations for present-day life. The recent decisions of courts first faced with the problems of persons supported by artificial life support systems are an excellent example of the struggle to develop the law in pace with the advance of medical technology. It may be noted as well that the courts can use the law to change social reality, as well as the converse. The Supreme Court's Brown v. Board of Education decision is one obvious example.

However that may be, it is sufficient here to reemphasize the point that the purposes of the legal system have shaped and developed its means. The legal case history method has developed in a formalized, efficient way because case law is the law. Since courts and lawyers are bound to be guided by prior decisions, it is imperative that they be able to locate those decisions quickly and with a minimum of error. Attorneys and judges must constantly develop their skills in using prior recorded cases, (respectively), to argue and decide the particular factual situation at hand.

B. FORMAT OF A REPORTED CASE

Case histories are written by judges, usually with the aid of their law clerks. These histories are variously referred to as opinions, decisions, or simply as cases. These labels indicate that this document reflects the judge's interpretations of the facts as presented, the application of reasoning to those facts, and the authoritative result. The result of a case is authoritative in a dual sense: for one thing, the judgment conclusively binds the particular parties to that action; secondly, the decision will carry precedential weight for subsequent cases involving other parties. The written opinion in the reported cases serves as both explanation and justification for the judge's action.

No particular format or formula is mandated for the writing of a judicial opinion. However, virtually all opinions do follow a certain structure which has evolved to present all the necessary elements of the decision in a logical, orderly fashion. Those elements in order of their usual presentation are the procedural history of the particular action; a statement of the facts of the case; a statement of the legal issues to be decided by the court; a discussion of legal principles as set forth in prior decisions and now applied to the facts of the present case; and finally, the result reached in this case.

An opinion typically begins by setting forth the procedural history of the particular action before the court. That is, it is stated at the outset whether this action is before the trial court or before the court of appeals. Moreover, it will be stated whether one of the parties has asked for a decision as to only a distinct part of the case at the present time. If it is an appellate decision which is being reported, it will be carefully noted, not only which party won before, but also which

issues have been preserved for review by the parties. The procedural history of an action must be thoroughly set forth, because that procedure legally limits the issues presented to the court for decision at this juncture.

A judicial opinion also includes a presentation of the facts of the case. Not all cases are tried by a jury, but in those which are, the jury receives the evidence, evaluates it, and "finds the facts"--i.e., decides which version of the facts presented is the true version. The judicial opinion, then, will set forth a summary of the evidence presented to the jury. For example, the jury may have been told that A made the statement, "I will walk across Niagara Falls on a tightrope for anyone who will pay me $5,000 in advance." The evidence presented indicated further that B thereafter offered A a money order for $5,000 and a length of sturdy rope and demanded A's performance. A then refused to walk across, saying that he had merely been joking. The jury could find from the evidence that A really had been joking, never intending to perform the stunt under any circumstances. However, B had no objective way of knowing that A was truly joking, but could have reasonably believed that A was making a serious offer to take this risk for a given sum of money. All these findings are factually grounded in a particular set of circumstances with particular persons.

The facts having been set forth, a judicial opinion then states the legal issues presented in the action. That is, taking this set of facts to be the truth, what should be the legal result? It is a maxim of the common law system that the jury finds the facts (i.e., determines what actually happened in the particular action) and the court decides the law (i.e., formulates general principles applicable to all situations with

similar factual elements). It is well recognized that the court's particular phrasing of the legal issue to be decided, whether in broad or narrow, general or specific terms, is critical for the use of that decision as precedent. For instance, the court might say, "The issue to be decided is whether, if one person offers to (walk a tightrope) (take a physical risk) (perform an action), but does not subjectively intend to do so, is he legally liable for his subsequent refusal to do so, where the other party had no reasonable means of knowing that the first party was only joking?" The broadest phrasing of the issue clearly makes for a broader, more generally applicable precedent for future cases.

The court's statement of legal issues then leads directly to its discussion of legal principles to be applied to the facts at hand. Some of the legal principles to be discussed in such a case are the relevancy of a person's subjective intent in offering to do a given task; the importance of reasonable interpretation of an offer to perform; the appropriate remedy--whether a person could be compelled to take a physical risk; the difference, if any, between commercial and non-commercial offers; and so on. Typically the court will engage in some discussion and interpretation of leading prior cases which have addressed the same issues in other factual situations.

Keep in mind that a court is bound to follow its own prior decisions and those of higher courts in that jurisdiction. The court's written opinion will therefore analogize this case to some prior similar case and distinguish the present case from others. It may be that there has never been a case within that jurisdiction deciding the legal point now in contention. The court would then refer to decisions of other jurisdictions, discussing and weighing the policies supporting one result

or the other. Moreover, if the issue is the applicability of a statute to a particular set of facts, the court will consider the language of the statutory text, the history of the legislation, the arguments presented to the lawmakers, and other indications of legislative intent--i.e., whether the statute was meant by the legislature to encompass the situation at hand. The discussion section of the judicial case opinion is thus intended to be a logical, neutral exposition of legal principles, derived from precedent (or from the statutory text) and reinterpreted in light of the particular set of facts now facing the court.

That done, the court renders its decision: Y set of principles, applied to X set of facts, yields Z result. Here again, the court may state its result in narrow terms, emphasizing the particular facts confronting it. While a result so stated will of course bind the immediate parties to the action, it is less likely to be cited as precedent for future cases, since it will be argued that this result will not obtain in factual situations even slightly different. Conversely, if the language of a case is broadly stated, the case is more amenable to application to more varied subsequent cases. A decision about offers to walk tightropes will clearly be of less precedential weight than one phrased on terms of offers to take physical risks. Even more generally, a court may choose to emphasize the "subjective jest" aspect of the case, ignoring the subject matter of that jest altogether. Future courts may, of course, reinterpret a narrowly-phrased decision more broadly or limit a broadly-phrased holding to the particular facts of that case. The court's own explanation of its decision is thus constantly subject to re-explanation, and its legal principles subject to redefinition in the discussion portions of later opinions.

C. USE OF CASES BY ATTORNEYS

It might be said that a practicing attorney uses legal case opinions in two distinct ways, for two distinct roles. To better serve the role of counselor, the attorney studies cases to ascertain what the law is. By determining how courts have dealt in the past with situations similar to that now faced by the client, and by seeking the guidelines and standards which the courts have set for conduct under similar circumstances, the attorney is better able to advise the client as to the proper course of action to take to avoid any subsequent legal challenge. By the same token, a lawyer must know what the law is to correctly evaluate whether the client has a good claim for recovery against another. Have the courts granted relief in the past to others in the client's position? If not, have the courts indicated that relief might be granted in a slightly different context, or with more compelling facts? If the answer is still no, do the prior decisions rest on policies which are no longer in favor; or, if the policy's goals are still desirable, has experience shown that these means do not attain them? If the case law of the applicable jurisdiction strongly suggests that the prospective client's claim does not warrant recovery, the attorney is obligated to advise the client of that circumstance and proceed no further.

In these situations, the attorney's reading of case law is essentially value-neutral. Of course, the lawyer will doubtless seek support in the reported case law for the course of action which the client wishes (for business, personal, or other non-legal reasons) to pursue; likewise, a plaintiff's attorney searches cases in hope of finding that the client has a claim for recovery. Those factors clearly

bias the lawyer's interpretation of case law. Nonetheless, the lawyer as counselor is under very real pressure to consider all sides to the question presented by the client--to evaluate honestly all possible objections to the proposed course of conduct or projected claim for relief--and so must endeavor to learn what the law is, whether favorable to the client or not.

The lawyer uses case law somewhat differently in the role of advocate. Once a course of action has been undertaken or a claim made, it is the lawyer's function to justify and promote the client's position in a most single-minded fashion. The common law system of revolving disputes between parties is founded upon the proposition that the truth of the matter in dispute, whether the issues are factual or legal, is most reliably and efficiently found by allowing all opposing parties to set forth the strongest arguments in their favor, those arguments then to be evaluated and the issues to be decided by a neutral and independent adjudicator. The merits of that proposition, both theoretical and practical, have been endlessly debated. Nonetheless, it is the cornerstore of our legal system, and it impresses upon the practicing attorney the adversarial nature of the role as advocate in the litigated case.

Let us be clear that the lawyer's adversary role does not so much influence the private reading and interpretation of case law as it does the public presentation of it. Obviously, a competent attorney cannot read and perceive only those cases whose results are favorable to the client and ignore other cases with distinctly unfavorable results. Indeed, it is the lawyer's obligation to consider the most favorable case in the most critical light, to search out its weakest logical links so they may be strengthened. Anticipating the opposing attorney's arguments

is crucial if one is to effectively refute them and so to bolster one's own point in the end. Even in the adversary role, then, the attorney must evaluate the applicable case law dispassionately, analyze it thoroughly, and from its elements construct the strongest possible argument to support the client's position. When this process is carried out most effectively, the arguments presented, although urging a particular result, give the strongest impression of reasonableness and justice.

The attorney facing litigation faces two tasks in presenting the client's case: to prove the set of facts supporting the client's position, and to argue which principles of law apply to those facts to produce a favorable result. The use of case law is more directly involved with the latter task, although it clearly has some bearing on the first.

The facts of a case are proved at the trial level. Each party presents evidence, in the form of witnesses' testimony, documents, and other exhibits, seeking to establish that the facts are as contended. To the extent that the facts are in dispute, the jury decides which party's version is more credible. The lawyer's presentation of a set of facts is governed by the rules of evidence. These rules have been developed to allow the tryer of fact to consider only evidence that is relevant, reliable, and not unduly prejudicial. The rules of evidence are also law; they are legal principles developed by the courts for their own use, and they vary among jurisdictions. Questions as to the admissibility of a given bit of evidence must be decided by the trial court, and are frequently the subject of written judicial opinions. Accordingly, a lawyer must consult case law to decide whether a particular item of evidence will be admitted, and will use such case law to argue that his

or her own evidence should be admitted and that the opponent's evidence should be excluded.

Apart from the use of case law to argue points of evidence, there is another aspect of a lawyer's proof of fact which requires reference to case law. In order for a plaintiff to warrant recovery, the lawyer must offer evidence as to all the factual elements necessary to establish the claim. For example, suppose a child is struck by an automobile in the parking lot of a grocery store. The child sues the driver of the car on the theory that the car driver was negligent. In order to recover, the child must prove, first of all, that the defendant driver owed a "duty of due care" to the child (e.g., a duty to make proper observations while operating a vehicle); that the defendant breached that duty (e.g., the driver failed to make proper observations); that the defendant's breach of duty proximately caused the incident; and that the child suffered compensable injuries as the result. Failure to prove any one of these factual elements--duty, breach, causation, injury--will mean that the plaintiff child may not recover from the defendant driver.

For each theory of recovery, the case law of the jurisdiction has developed the factual elements necessary for recovery. The example given is simple and straight-forward, but more complex cases have evolved more complex factual elements. Take the matter of proof of injury or harm. Actual physical, bodily harm is legally compensable; however, psychological harm, without any accompanying physical injury or shock, is compensable only in narrowly specified cases. If the plaintiff child has not actually been struck by the automobile in the parking lot, but had only been frightened by a near miss, he or she would ordinarily not be entitled to any recovery from the defendant. That is so because the case law of most jurisdictions says that it is so. Similarly, if the car's

impact with the child's body was caused, not by any negligent conduct of the driver, but by the child's sister suddenly pushing the child unexpectedly into the car's path, the plaintiff could not recover against the driver, because the factual element of causation would be missing. The case law on the necessity of proving the factual element of causation, and of the sort of facts that would constitute legal causation are voluminous. The set of factual elements necessary to establish a case may vary among the various jurisdictions. For example, in a small minority of states, the plaintiff child would have to prove, not only that the defendant driver was negligent, but that he himself was not negligent. In preparing to present the set of facts, the attorney must consult the case law of the jurisdiction to insure that evidence as to each element necessary for recovery is presented.

Since the facts of the case are proved at the trial level, the attorney's use of case law is made in oral argument to the Judge as to the admissibility of an item of evidence or in a written trial brief, arguing the presence (or absence) of the essential elements of the case. Once the facts are established, however, the attorney must argue the law applying to those facts. This is the primary area in which the attorney uses case law, both at the trial level and on appeal (where the facts are taken as they were found by the jury).

To argue the law means simply this: the lawyer contends that, given these established facts, these legal principles apply and yield this particular result. In some instances, the argument may revolve about the issue of whether a certain fact is a legal element necessary for recovery. Assume that Suzy's attorney established to the jury's satisfaction that Johnny pulled a chair out from under Suzy, causing her to break her neck. Assume moreover that the jury has also found as a

factual matter that Johnny did not subjectively intend to injury Suzy; he only wanted to see what her reaction would be to his prank. The legal question presented is whether a malicious intention to cause injury is a necessary element of proof for Suzy to recover against Johnny. Suzy's attorney will look for cases with similar facts which can be interpreted to say that intention or motivation is irrelevant to recovery. Johnny's attorneys will look for cases which appear to rely on proof of malicious motivation as a basis for recovery.

In other situations, attorneys will resort to case law to argue the liability of parties on other grounds. Suppose a bank cashes a check with a forged endorsement. Is the bank liable to make good any losses suffered? Suppose a company manufactures a lawn mower which it sells to a wholesaler, who sells it to a retailer, who sells it to a consumer, who lends it to a neighbor, whose son is injured by a flying pebble spun from a blade set too low. Is the manufacturer responsible? What about the neighbor who lent the machine? Can the injured child recover from his own father, who was operating the machine? What principles of law are applicable to each of these? Even if the facts are clearly established, the lawyer must search the case law for the legal principles which must guide a decision as to each legal issue and to the ultimate result in the present case.

The attorney can approach the task of arguing legal issues in several different ways. The most obvious method, it might seem, would be to immediately seek out reported cases with facts similar to the present case, examine the legal principles expanded in that case with what results, and apply the principles and results in a straightforward way. If the results are favorable to the client, the lawyer simply argues that the present case is like the former one, the same principles would apply,

and the same results obtained. If the results in the prior case are not favorable to the client, the attorney attempts to distinguish the prior case from the client's case. The attorney will argue that the facts of the present case are different from those of the prior case and that, moreover, the distinguishing facts are crucial to the outcome of the case. Therefore, the argument goes, the results of the prior case are inapplicable to the case at hand, and the result should differ accordingly. Alternatively, the lawyer might argue that the law was simply wrong in the prior case; the policies that guided the court's decision in prior years no longer prevail; experience has shown the need for a new and different policy; and those new principles and policies mandate a new and different result.

The alternative approach to the argument of legal issues starts out with an exposition of legal principles and works backward to present facts. The lawyer seeks out and examines the reported and authoritative statements of courts in the jurisdiction regarding the principles of law whose application is presently in dispute. As noted above, those precedential opinions may be variously broad or narrow in scope. An opinion may include a lengthy discussion of policy or a detailed explanation of the application of the stated rule to a number of factual situations. An opinion may, on the other hand, simply repeat a shop-worn statement of legal principle and the bald result in that case without any elucidation of the process involved in arriving at that result from that principle. It is the attorney's task to develop a precise, refined statement of legal principle which, if accepted and applied to the present facts, will necessarily yield the desired result, supporting that particular statement of principle by referring to precedential statements of that same principle.

It might be contended that in many instances the legal principle is clear and undisputed, and that it is the application of that principle to the facts, not the statement of the principle itself, which is the ground for argument. This is simply another aspect of the varying breadth of the principle as stated: whether its statement is sufficiently refined to be clear in its application. However the task of argument is conceived, the measure of the lawyer's skill lies in the ability to critically analyze prior statements of principle and application, and then to synthesize those elements into a logical, persuasive presentation of principle, application, and result in the matter to be decided.

Here again, the lawyer's argument is forged with the fundamental tools of analogy and distinction:

> The Greene case stated the governing principles to be such and such, with this result. My case is so factually similar to Greene that this same result is mandated here as well. It is true that the Redd case stated the principle to be this and that, with that different result. However, the Redd case dealt with an extraordinary factual situation; Redd's different result, accordingly, should be strictly limited to its peculiar circumstances. And to prove my point, please note that the courts deciding the latter cases of Blacke and Blue both followed the Greene decision, agreeing that the Redd case had limited application because of its unusual facts. This present case is more like Greene (and like Blacke and Blue) than it is like Redd. Therefore, the Greene result should be reached here as well.

And so on. The attorney begins by seeking case citations of those principles which are favorable to the client and then checking those cases to find those with the factual situations most closely analogous to the present circumstances. Again, the lawyer must refer to case law within the court's jurisdiction since that precedence is binding upon this court. If by chance the precise point of law has never before been decided in this jurisdiction, the lawyer may present case opinions from

other jurisdictions which have faced this issue and argue that their decisions provide persuasive, if not binding, authority for decision in the present matter.

To sum up, then, the attorney in the role of advocate in litigation uses case law primarily to argue for the particular application of a legal principle to a set of given facts, once those facts are correctly proved according to the rules of evidence. In the role of counselor, the attorney uses case law to understand the present state of the law's development in a particular area of interest; this allows the lawyer to properly advise the client as to whether the latter has a claim against another, or as to which of several alternative actions will best protect the client against possible legal problems. In either role, the attorney must read the applicable case law closely and critically, simultaneously comparing and distinguishing it from the present factual situation for which some decision is required.

D. REPORTING AND CATEGORIZATION SYSTEM FOR CASE DECISIONS

Because the efficient operation of the legal system clearly depends so heavily on the ready access to decided cases by the courts and by attorneys, a relatively thorough method of recording and categorizing those decisions has developed over the years. In the United States, the major reporting system for case opinions has been developed by the West Publishing Company. West Publishing is a private organization. It prints, in book form, case decisions forwarded to it by the various state and federal courts. In addition, most states and the United States Supreme Court have a separate, official reporting system. For those courts, then, cases are reported in two different volumes; cross-indexes

are available. West Publishing has also developed a categorization and digesting system to facilitate finding the law appropriate to a particular factual situation. Because of its pervasive influence, the focus here will be upon the West method.

All cases which reach the courts are eventually decided. However, not all decisions rendered are reported in printed form. Some may be delivered orally by the judge; some are written in the form of so-called letter opinions; forwarded to the parties but not reported generally to other courts. Even where case decisions are written in the traditional format, not all of them are necessarily forwarded to the publisher for publication. West Publishing does not decide whether to report a particular decision. That function is exercised by various judicial administrative agencies, specially designated by the particular state or federal court system, which decide whether the issues presented and the decisions rendered are important enough to warrant publication. Each agency presumably develops its own criteria for publishable opinions. Those meeting those criteria are forwarded to the official publisher and to West Publishing.

Once the decision has been sent to West Publishing, that company simply reprints the opinion as it is sent. There is, of course, a certain amount of editorial control and checking to insure that the publication is accurate. However, there is no editorial imposition of format by West, and certainly no control over the substance of the reported opinion.

West does, however, provide certain additions to the opinion as written and delivered by the court. For one thing, West includes information on the particular attorneys involved in the case; it is frequently useful for a lawyer preparing for litigation to contact an

attorney who has prepared a similar case. Moreover, West's staff develops a brief summary of the case, including a short recital of the facts involved, the principles discussed, and the result reached. This case summary is printed at the very beginning of the opinion, immediately after the caption of the case. It provides a quick, shorthand reference for legal researchers, who can see quickly whether the case is applicable to their problem and the result reached in that case.

Finally, West also provides so-called headnotes--sentence-length statements of the principles of law discussed in that opinion. The headnotes are printed with short-phrase labels and numerical cross-references to West's categorization system (keynotes), discussed below. The headnotes are printed after the case summary and just before the text of the opinion. The headnotes are numbered, and those numbers are printed at appropriate points within the text of the opinion itself so that the researcher can quickly find the section of opinion cited in the headnote.

West's case summaries and headnotes are not approved by the courts, neither as accurate statements of the law nor as correct interpretations of the principles expounded in that opinion. Consequently, every legal researcher discovers that, while the case summaries and headnotes are useful guides to a case opinion, they are not authorities and moreover, are not always accurate reflections of the opinion itself. It is the text of the opinion which is the authoritative law, and the text itself must be carefully read and analyzed to interpret what the law is.

Once the case summaries and headnotes are prepared, the case opinions are printed in book form. They are published in multi-volume sets, in quasi-chronological order. Case opinions are not segregated by the area of law discussed, neither by separate volume nor within any given

volume. The reporter series are segregated neither by the jurisdiction of the court. West publishes state court opinions in six different regional reporters, each including cases from states within a defined geographical area. The cases of Federal District Courts are reported in the Federal Supplement series; case opinions of the Federal Courts of Appeals are reported in the Federal Reporter series. Three different reporter series, one official and two unofficial, report the opinions of the United States Supreme Court. Official state reporters may include one series to report the decisions of the state's highest court and another series for the trial and intermediate appeals courts.

Since reporter systems are separated only by the jurisdiction of the courts whose opinions are reported therein, and not by the types of cases discussed, finding cases applicable to a particular legal issue may be a formidable task. To deal with this situation, West Publishing has developed a classification scheme according to the various areas of law. Under this scheme, a particular legal topic is outlined and broken down into ever-smaller and finer sub-categories. For example, one major topic is Federal Constitutional law. Respectively smaller, outlined sub-categories would then include fundamental rights and privileges; specific fundamental rights; religious freedom; nature of the right; concept of the separation of the church and state. Each of these categories would include any number of sub-categories. The smallest outlined sub-categories are numbered, and are entitled keynotes. These keynotes correspond to the short phrase labels attached to the headnotes in reported case opinions.

For each reporter series, then, state and Federal, West Publishing prints a digest series. The digest prints the keynote classification system. Under each keynote are reprinted the headnotes from the cases

reported in that particular series. The legal researcher's task is to search the keynote outline; to determine which keynotes will address the issue he or she is researching; to read the headnotes printed under those keynotes; and finally to read the case opinions indicated. Only then may the particular language of the stated principles, and the factual situation under which those principles were so stated, be fully analyzed.

One beauty of the digest system is that it may be continually amplified and refined. That is, new sub-categories (keynotes) can be added at any time to keep up with the developing law. Occasionally entire new topics are added. Conversely, this system is flawed to the extent that its outlines are insufficiently delineated. A great many keynotes are far too broad, including headnotes and cases with greatly dissimilar underlying facts. The researcher thus wastes his time and resources in checking inappropriate cases. Moreover, there are frequently found subtle errors in the initial classification of a stated principle into keynote/headnote. The researcher may simply not conceive of the issue presented in the manner in which West has classified it and thus may never find a particular case opinions which is in fact directly on point with his problem. Finally, West's phrasing of its headnotes can be generally critized for emphasizing the statement of principle to the exclusion of facts. Accordingly, it can be extremely difficult to find a factually similar case without actually referring to the case itself, an extremely time-consuming process. The legal researcher thus must depend heavily upon his own ingenuity despite the aid of West's digest system.

As noted, the West system is basically an outline system in which legal principles reported in case law are categorized by logically defined areas of law. A recent development is a computerized system, called LEXIS, which requires the researcher to analyze his issue and

extract from it key words which would appear in a case discussing that issue, but few other issues. Those words are fed into the computer, which then performs a word scan of the case opinions in its file. The obvious disadvantage of the system is that it depends entirely upon the researcher's intuition about the issue's exclusive key words. The advantage is that relevant cases, once found, are immediately retrievable. West has begun development and limited distribution of a computerized system based on its own index system, which may combine the best of both systems.

E. AN EXAMPLE OF A CASE HISTORY IN THE LAW

The following is an example of a case history in the law taken from "100 Supreme Court Reporter".

Otis TRAMMEL, Jr., Petitioner,

v.

UNITED STATES.

No. 78-5705.

Argued Oct. 29-30, 1979.

Decided Feb. 27, 1980.

Defendant was convicted before the United States District Court for the District of Colorado of importation of heroin and conspiracy to import heroin, and he appealed. The Court of Appeals affirmed, 583 F.2d 1166. On writ of certiorari to the Court of Appeals, the Supreme Court, Mr. Chief Justice Burger, held that: (1) apart from confidential communications, a witness spouse alone has the privilege to refuse to testify adversely and may be neither compelled to testify nor foreclosed from testifying, and (2) that the spouse of accused chose to testify against him after grant of immunity and assurances of lenient treatment did not render her testimony involuntary, and accused's claim of privilege was properly rejected.

Affirmed.

Mr. Justice Stewart filed a concurring opinion.

1. Witnesses--184(1)

Federal Rules of Evidence acknowledge authority of federal courts to continue evolutionary development of testimonial privileges in federal criminal trials governed by principles of common law as they may be interpreted in light of reason and experience. Fed.Rules Evid. Rule 501, 28 U.S.C.A.

2. Witnesses--184(1)

In rejecting proposed rules and enacting Evidence Rule 501, Congress manifested affirmative intention not to freeze law of privilege, and purpose of rule, rather, was to provide courts with flexibility to develop rules of privilege on case-by-case basis. Fed.Rules Evid. Rule 501.28 U.S.C.A.

3. Courts--79

Statute limits Supreme Court's statutory rule-making authority by providing that rules creating, abolishing or modifying privilege shall have no force or effect unless approved by act of Congress, but was enacted principally to insure that state rules of privilege would apply in diversity jurisdiction cases unless Congress authorized otherwise, and statute was not attempt to prevent federal courts from developing testimony privilege law in federal criminal cases on case-by-case basis in light of reason and experience. 28 U.S.C.A. § 2076; Fed.Rules Evid. Rule 501, 28 U.S.C.A.

4. Witnesses--52(1)

Trend in state law toward divesting accused of privilege to bar adverse spousal testimony has special relevance because law of marriage and domestic relations are concerns traditionally reserved to states. 28 U.S.C.A. § 2076; Fed.Rules Evid. Rule 501, 28 U.S.C.A.

5. Witnesses--184(1)

Testimonial exclusionary rules and privileges contravene fundamental principle that public has right to every man's evidence, and thus are to be strictly construed and accepted only to very limited extent that permitting refusal to testify or excluding relevant evidence has public good transcending normally predominant principle of utilizing all rational means for ascertaining truth. 28 U.S.C.A. § 2076; Fed.Rules Evid. Rule 501, 28 U.S.C.A.

6. Witnesses--188(1)

Marital confidences are privileged under independent rule protecting confidential marital communications.

7. Witnesses--52(1, 8), 54

Apart from confidential communications, witness spouse alone has privilege to refuse to testify adversely and may be neither compelled to testify nor foreclosed from testifying.

8. Witnesses--52(8)

That spouse of accused chose to testify against him after grant of immunity and assurances of lenient treatment did not render her testimony involuntary, and accused's claim of privilege was properly rejected. 28 U.S.C.A. § 2076; Fed.Rules Evid. Rule 501, 28 U.S.C.A.

Syllabus*

Prior to his trial with others on federal drug charges, petitioner advised the District Court that the Government intended to call his wife (who had been named in the indictment as an unindicted co-conspirator) as an adverse witness and asserted a privilege to prevent her from testifying. The District Court ruled that confidential communications between petitioner and his wife were privileged and therefore inadmissible, but the wife was permitted to testify to any act she observed before or during the marriage and to any communication made in the presence of a third person. Primarily on the basis of his wife's testimony, petitioner was convicted, and the Court of Appeals affirmed, rejecting petitioner's contention that the admission of his wife's adverse testimony, over his objection, contravened the decision in Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125, barring the testimony of one spouse against the other unless both consent.

Held: The Court modifies the Hawkins rule so that the witness spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. Here, petitioner's spouse chose to testify against him; that she did so after a grant of immunity and assurances of lenient treatment does not render her testimony involuntary, and thus petitioner's claim of privilege was properly rejected. Pp. 909-914.

(a) The modern justification for the privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship. While this Court, in Hawkins, supra, reaffirmed the vitality of the common-law privilege in the federal courts, it made clear that its decision was not meant to "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'" 358 U.S., at 79, 79 S.Ct., at 139. Pp. 909-910.

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*The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

(b) Rule 501 of the Federal Rules of Evidence acknowledges the federal courts' authority to continue the evolutionary development of testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Pp. 910-911.

(c) Since 1958, when Hawkins was decided, the trend in state law has been toward divesting the accused of the privilege to bar adverse spousal testimony. Pp. 911-912.

(d) Information privately disclosed between husband and wife in the confidence of the marital relationship is privileged under the independent rule protecting confidential marital communications, Blau v. United States, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306; and the Hawkins privilege, which sweeps more broadly than any other testimonial privilege, is not limited to confidential communications but is invoked to also exclude evidence of criminal acts and of communications in the presence of third persons. The ancient foundations for so sweeping a privilege--whereby a woman was regarded as a chattel and denied a separate legal identity--have long since disappeared, and the contemporary justification for affording an accused such a privilege is unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding--whatever the motivation--there is probably little in the way of marital harmony for the privilege to preserve. Consideration of the foundations for the privilege and its history thus shows that "reason and experience" no longer justify so sweeping a rule as that found acceptable in Hawkins. Pp. 912-914.

583 P.2d 1166, affirmed.

Sol. Gen. Wade H. McCree, Jr., Washington, D. C., for respondent.

J. Terry Wiggins, Denver, Colo., for petitioner.

Mr. Chief Justice BURGER delivered the opinion of the Court

We granted certiorari to consider whether an accused may invoke the privilege against adverse spousal testimony so as to exclude the voluntary testimony of his wife. 440 U.S. 934, 99 S.Ct. 1277, 59 L.Ed.2d 492 (1979). This calls for a re-examination of Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958).

I

On March 10, 1976, petitioner Otis Trammel was indicted with two others, Edwin Lee Roberts and Joseph Freeman, for importing heroin into the United States from Thailand and the Philippine Islands and for conspiracy to import heroin in violation of 21 U.S.C. §§ 952(a), 962(a), and 963. The indictment also named six unindicted co-conspirators, including petitioner's wife Elizabeth Ann Trammel.

According to the indictment, petitioner and his wife flew from the Philippines to California in August 1975, carrying with them a quantity of heroin. Freeman and Roberts assisted them in its distribution. Elizabeth Trammel then travelled to Thailand where she purchased another supply of the drug. On November 3, 1975, with four ounces of heroin on her person, she boarded a plane for the United States. During a routine customs search in Hawaii, she was searched, the heroin was discovered, and she was arrested. After discussions with Drug Enforcement Administration agents, she agreed to cooperate with the Government.

Prior to trial on this indictment, petitioner moved to sever his case from that of Roberts and Freeman. He advised the court that the Government intended to call his wife as an adverse witness and asserted his claim to a privilege to prevent her from testifying against him. At a hearing on the motion, Mrs. Trammel was called as a Government witness under a grant of use immunity. She testified that she and petitioner were married in May 1975 and that they remained married.1* She explained that her cooperation with the Government was based on assurances that she would be given lenient treatment.2 She then described, in considerable detail, her role and that of her husband in the heroin distribution conspiracy.

After hearing this testimony, the District Court ruled that Mrs. Trammel could testify in support of the Government's case to any act she observed during the marriage and to any communication "made in the presence of a third person"; however, confidential communications between petitioner and his wife were held to be privileged and inadmissible. The motion to sever was denied.

At trial, Elizabeth Trammel testified within the limits of the court's pretrial ruling; her testimony, as the Government concedes, constituted virtually its entire case against petitioner. He was found guilty on both the substantive and conspiracy charges and sentenced to an indeterminate term of years pursuant to the Federal Youth corrections Act, 18 U.S.C. § 5010(b).3

In the Court of Appeals petitioner's only claim of error was that the admission of the adverse testimony of his wife, over his objection, contravened this Court's teaching in Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed2d 125 (1958), and therefore constituted reversible error. The Court of Appeals rejected this contention. It concluded that Hawkins did not prohibit "the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the government in return for her testimony." 583 F.2d 1166, 1168 (CA10 1978).

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*All footnotes appear at end of example, P. 32

II

The privilege claimed by petitioner has ancient roots. Writing in 1628, Lord Coke observed that "it hath been resolved by the Justices that a wife cannot be produced either against or for her husband." 1 Coke, A Commentarie upon Littleton 6b (1628). See, generally, 8 J. Wigmore, Evidence § 2227, (McNaughton rev. 1961). This spousal disqualification sprang from two canons of medieval jurisprudence: first, the rule that an accused was not permitted to testify in his own behalf because of his interest in the proceeding; second, the concept that husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one. From those two now long-abandoned doctrines, it followed that what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife.

Despite its medieval origins, this rule of spousal disqualification remained intact in most common-law jurisdictions well into the 19th century. See 8 Wigmore, § 2333. It was applied by this Court in Stein v. Bowman, 13 Pet. 209, 220-223, 10 L.Ed. 129 (1829), in Graves v. United States, 150 U.S. 118, 14 S.Ct. 40, 37 L.Ed. 1021 (1893), and again in Jin Fuey Moy v. United States, 254 U.S. 189, 195, 41 S.Ct. 98, 101, 65 L.Ed. 214 (1920), where it was deemed so well established a proposition as to "hardly requir[e] mention". Indeed, it was not until 1933, in Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369, that this Court abolished the testimonial disqualification in the federal courts, so as to permit the spouse of a defendant to testify in the defendant's behalf. Funk, however, left undisturbed the rule that either spouse could prevent the other from giving adverse testimony. Id., at 373, 54 S.Ct., at 212. The rule thus evolved into one of privilege rather than one of absolute disqualification. See J. Maguire, Evidence, Common Sense and Common Law, at 78-92 (1947).

The modern justification for this privilege against adverse spousal testimony is its perceived role in fostering the harmony and sanctity of the marriage relationship. Notwithstanding this benign purpose, the rule was sharply criticized.[4] Professor Wigmore termed it "the merest anachronism in legal theory and an indefensible obstruction to truth in practice." 8 Wigmore, § 2228, at 221. The Committee on the Improvement of the Law of evidence of the American Bar Association called for its abolition. 63 American Bar Association Reports, at 594-595 (1938). In its place, Wigmore and others suggested a privilege protecting only private marital communications, modeled on the privilege between priest and penitent, attorney and client, and physician and patient. See 8 Wigmore, § 2332 et seq.[5]

These criticisms influenced the American Law Institute, which, in its 1942 Model Code of evidence advocated a privilege for marital confidences, but expressly rejected a rule vesting in the defendant the right to exclude all adverse testimony of his spouse. See American Law Institute, Model Code of Evidence, Rule 215 (1942). In 1953 the Uniform Rules of Evidence, drafted by the National Conference of Commissioners on Uniform State Laws, followed a similar course; it limited the privilege to confidential communications and "abolishe[d] the rule, still existing in some states, and largely a sentimental relic, of not requiring one

spouse to testify against the other in a criminal action." See Rule 23(2) and comments. Several state legislatures enacted similarly patterned provisions into law.6

In Hawkins v. United States, 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958), this Court considered the continued vitality of the privilege against adverse spousal testimony in the federal courts. There the District Court had permitted petitioner's wife, over his objection, to testify against him. With one questioning concurring opinion, the Court held the wife's testimony inadmissible; it took note of the critical comments that the common-law rule had engendered, id., at 76, and N. 4, 79 S.Ct., at 137, but chose not to abandon it. Also rejected was the Government's suggestion that the court modify the privilege by vesting it in the witness spouse, with freedom to testify or not independent of the defendant's control. The Court viewed this proposed modification as antithetical to the widespread belief, evidenced in the rules then in effect in a majority of the States and in England, "that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences". Id., at 79, 79 S.Ct., at 139.

Hawkins, then, left the federal privilege for adverse spousal testimony where it found it, continuing "a rule which bars the testimony of one spouse against the other unless both consent". Id., at 78, 79 S.Ct., at 138. Accord, Wyatt v. United States, 362 U.S. 525, 528, 80 S.Ct. 901, 903, 4 L.Ed.2d 931 (1960).7 However, in so doing, the Court made clear that its decision was not meant to "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.'" 358 U.S., at 79, 79 S.Ct., at 139

III

A

[1-3] The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed.Rule Evid. 501. Cf., at 279 (1934). The general mandate of Rule 501 was substituted by the Congress for a set of privilege rules drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court. That proposal defined nine specific privileges, including a husband-wife privilege which would have codified the Hawkins rule and eliminated the privilege for confidential marital communications. See Fed.Rule of Evid., Proposed Rule 505. In rejecting the proposed rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis," 120 Cong.Rec. 40891 (1974) (statement of Rep. Hungate), and to leave the door open to change. See also S.Rep.No.93-1277, 93d Cong., 2d Sess., 11 (1974); H.R.Rep.No.93-650, 93d Cong., 1st Sess., 8 (1973),8 U.S.Code Cong. & Admin. News 1974, p. 7051.

Although Rule 501 confirms the authority of the federal courts to reconsider the continued validity of the Hawkins rule, the long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships--already subject to much erosion in our day--also counsels caution. At the same time we cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggest the need for change. This was recognized in Funk where the Court "decline[d] to enforce . . . ancient rule[s] of the common law under conditions as they now exist." 290 U.S., at 382, 54 S.Ct., at 215. For, as Mr. Justice Black admonished in another setting, "[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it." Francis v. Southern Pacific Co., 333 U.S. 445, 471, 68 S.Ct. 611, 623, 92 L.Ed. 798 (1948) (Black, J., dissenting).

B

[4] Since 1958, when Hawkins was decided, support for the privilege against adverse spousal testimony has been eroded further. Thirty-one jurisdictions, including Alaska and Hawaii, then allowed an accused a privilege to prevent adverse spousal testimony. 358 U.S., at 81, n. 3, 79 S.Ct., at 140, (STEWART, J., concurring). The number has now declined to 24.[9] In 1974, the National Conference on uniform States Laws revised its Uniform Rules of Evidence, but again rejected the Hawkins rule in favor of a limited privilege for confidential communications. See Uniform Rules of Evidence, Rule 504. That proposed rule has been anacted in Arkansas, North Dakota, and Oklahoma--each of which in 1958 permitted an accused to exclude adverse spousal testimony.[10] The trend in state law toward divesting the accused of the privilege to bar adverse spousal testimony has special relevance because the law of marriage and domestic relations are concerns traditionally reserved to the states. See Sosna v. Iowa, 419 U.S. 393, 404, 95 S.Ct. 553, 559, 42 L.Ed.2d 532 (1975). Scholarly criticism of the Hawkins rule has also continued unabated.[11]

C

[5] Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public . . . has a right to every man's evidence." United States v. Bryan, 339 (U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Elkins v. United States, 364 U.S. 206, 234, 80 S.Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting). Accord, United States v. Nixon, 418, U.S. 683, 709-710, 94 S.Ct. 3090, 3108-3109, 41 L.Ed.2d 1039 (1974). Here we must decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice.

[6] It is essential to remember that the Hawkins privilege is not needed to protect information privately disclosed between husband and wife in the confidence of the marital relationship--once described by this Court as "the best solace of human existence." Stein v. Bowman 13 Pet., at 223. Those confidences are privileged under the independent rule protecting confidential marital communications. Blau v. United States, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306 (1951); see n. 5, supra. The Hawkins privilege is invoked, not to exclude private marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third persons.

No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulare in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.

The Hawkins rule stands in marked contrast to these three privileges. Its protection is not limited to confidential communications; rather it permits an accused to exclude all adverse spousal testimony. As Jeremy Bentham observed more than a century and a half ago, such a privilege goes far beyond making "every man's house his castle," and permits a person to convert his house into "a den of thieves." 5 Rationale of Judicial Evidence 340 (1927). It "secures, to every man, one safe and unquestionable and every ready accomplice for every imaginable crime." Id., at 338.

The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world--indeed in any modern society--is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside so that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." Stanton v. Stanton, 421 U.S. 7, 14, 15, 95 S.Ct. 1373, 1377, 1378, 43 L.Ed.2d 688 (1975).

The contemporary justification for affording an accused such a privilege is also unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding--whatever the motivation--their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.[12] Indeed, there is a

reason to believe that vesting the privilege in the accused could actually undermine the marital relationship. For example, in a case such as this the Government in unlikely to offer a wife immunity and lenient treatment if it knows that her husband can prevent her from giving adverse testimony. If the Government is dissuaded from making such an offer, the privilege can have the untoward effect of permitting one spouse to escape justice at the expense of the other. It hardly seems conducive to the preservation of the marital relation to place a wife in jeopardy solely by virtue of her husband's control over her testimony.

IV

[7, 8] Our consideration of the foundations for the privilege and its history satisfy us that "reason and experience" no longer justify so sweeping a rule as that found acceptable by the Court in Hawkins. Accordingly, we conclude that the existing rule should be modified so that the witness spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification--vesting the privilege in the witness spouse--furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.

Here, petitioner's spouse chose to testify against him. That she did so after a grant of immunity and assurances of lenient treatment does not render her testimony involuntary. Cf. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Accordingly, the District Court and the Court of Appeals were correct in rejecting petitioner's claim of privilege, and the judgment of the Court of Appeals is affirmed.

Affirmed.

Mr. Justice STEWART, concurring in the judgment.

Although agreeing with much of what the court has to say, I cannot join an opinion that implies that "reason and experience" have worked a vast change since the Hawkins case was decided in 1958. In that case the Court upheld the privilege of a defendant in a criminal case to prevent adverse spousal testimony, in an all-but-unanimous opinion by Mr. Justice Black. Today the Court, in another all-but-unanimous opinion, obliterates that privilege because of the purported change in perception that "reason and experience" have wrought.

The fact of the matter is that the Court in this case simply accepts the very same arguments that the Court rejected when the Government first made them in the Hawkins case in 1958. I thought those arguments were valid then,[13] and I think so now.

The Court is correct when it says that "[t]he ancient foundations for so sweeping a privilege have long since disappeared." Ante, at 913. But hose foundations had disappeared well before 1958; their disappearance certainly did not occur in the few years that have elapsed between the Hawkins decision and this one. To paraphrase what Mr. Justice Jackson once said in another context, there is reason to believe that today's

opinion of the Court will be of greater interest to students of human psychology than to students of law.

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[1]In response to the question whether divorce was contemplated, Mrs. Trammel testified that her husband had said that "I would go my way and he would go his." (App., at 27).

[2]The Government represents to the Court that Elizabeth Trammel has not been prosecuted for her role in the conspiracy.

[3]Roberts and Freeman were also convicted. Roberts was sentenced to two years imprisonment. Freeman received an indeterminate sentence under the Youth Corrections Act.

[4]See Brosman, Edward Livingston and Spousal Testimony in Louisiana, 11 Tulane L.Rev. 243 (1937); Hutchins and Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn.L.Rev. 675 (1929); Note, 24 Calif.L.Rev. 472 (1936); Note, 35 Mich.L.Rev. 329 (1936); Note, 20 So.Cal.L.Rev. 94 (1935); Note, 20 Minn.L.Rev. 693 (1935).

[5]This Court recognized just such a confidential marital communications privilege in Wolfe v. United States, 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed. 617 (1934), and in Blau v. United States, 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306 (1951). In neither case, however, did the Court adopt the Wigmore view that the communications privilege be substituted in place of the privilege against adverse spousal testimony. The privilege as to confidential marital communications is not at issue in the instant case; accordingly, our holding today does not disturb Wolfe and Blau.

[6]See Note, Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend, 38 Va.L.Rev. 359 (1952).

[7]The decision in Wyatt recognized an exception to Hawkins for cases in which one spouse commits a crime against the other. 362 U.S., at 56, 80 S.Ct. at 902. This exception, placed on the ground of necessity, was a longstanding one at common law. See Lord Audley's Case, 123 Eng.Rep. 1140 (1931); 8 Wigmore § 2239. It has been expanded since then to include crimes against the spouse's property, see Herman v. United States, 220 F.2d 219, 226 (CA4 1955), and in recent years crimes against children of either spouse, United States v. Allery, 526 F.2d 1362 (CA8 1975). Similar exceptions have been found to the confidential marital communications privilege. See 8 Wigmore, § 2338.

[8]Petitioner's reliance on 28 U.S.C. § 2076 for the proposition that this Court is without power to reconsider Hawkins is ill founded. That provision limits this Court's statutory rulemaking authority by providing that rules "creating, abolishing, or modifying a privilege shall have no force or effect unless . . . approved by act of Congress." It was enacted principally to insure that state rules of privilege would apply in diversity jurisdiction cases unless Congress authorized otherwise. In

Rule 501 Congress makes clear that § 2076 was not intended to prevent the federal courts from developing testimonial privilege law in federal criminal cases on a case-by-case basis "in light of reason and experience"; indeed Congress encouraged such development.

[9]Eight states provide that one spouse is incompetent to testify against the other in a criminal proceeding: see Haw.Rev.Stat. § 621-18 (1968); Iowa Code § 622.7 (1979); Miss.CodeAnn § 13-1-5 (Cum.Supp.1978); N.C.Gen.Stat. § 2945.42; Pa.Stat.Ann., Tit. 42 §§ 5913, 5915 (Purdon Supp.1979); Tex.Crim.Pro.Code Ann.Art. 38.11 (Vernon 1979); Wyo.Stat. § 1-12-104 (1977).

Sixteen states provide a privilege against adverse spousal testimony and vest the privilege in both spouses or in the defendant-spouse alone; see Alaska Crim.Proc.Rules 26(b)(2) (Supp.Sept.1968); Col.Rev.Stat. § 13-90-107 (1974); Idaho Code § 9-203 (Cumm.Supp.1978); Mich.Comp.Laws § 600.2162 (Mich.Stat.Ann. § 595.02 (West Cum.Supp.1978); Mo.Ann.Stat. § 546.260 (Vernon 1953); Mont.Rev.Codes Ann. § 95-3011 (Cum.Supp.1975); Neb.Rev.Stat. § 27-505 (1975); Nev.Rev.Stat. § 49.295 (1977); N.J.Stat.Ann. § 2A:84A-17 (West 1976); N.M.Stat.Ann. § 20-4-505 (Cum.Supp.1975); Ore.Rev.Stat. § 44.040 (1977); Utah Code Ann. § 78-24-8 (1977); Va.Code § 19.2-271.2 (Cum.Supp1978); Wash.Rev.Code Ann. § 5.60.060 (Supp.1979); W.VaCode § 57-3-3 (1966).

Nine states entitle the witness-spouse alone to assert a privilege against adverse spousal testimony: see Ala.Code, Tit. 12 § 21-227 (1977); Cal.Evid.Code §§ 970-973 (West 1966); Conn.Gen.Stat.Ann. § 54-84 (West Cum.Supp.1979); Ga.Code Ann. § 38-1604 (1974); Ky.Rev.Stat. § 421.210 (Cum.Supp.1978); La.Rev.Stat.Ann. § 15:461 (West 2967); Md.Cts. and Jud.ProcCode Ann. §§ 9-101, 9-106 (1974); Mass.Ann.Laws ch. 233, § 20 (Law. Co-op 1974); R.I.Gen.Laws § 12-17-10 (1970).

[10]In 1965, California took the privilege from the defendant-spouse and vested it in the witness-spouse, accepting a study commission recommendation that the "latter [was] more likely than the former to determine whether or not to claim the privilege on the basis of the probable effect on the marital relationship." See Cal.Evi.Code §§ 970-973 and 1 California Law Revision Commission, Recommendation and Study relating to The Marital "For or Against" Testimonial Privilege at P-5 (1956). See also 6 California Law Revision Commission, Tentative Privileges Recommendations--Rule 27.5, at 243-244 (1964).

Support for the common-law rule has also diminished in England. In 1972 a study group there proposed giving the privilege to the witness-spouse, on the ground that "if [the wife] is willing to give evidence . . . the law would be showing excessive concern for the preservation of marital harmony if it were to say she must not do so." Criminal Law Revision Committee, Eleventh Report Evidence (General), at 93.

[11]See Reutlinger, Policy, Privacy and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege, 61 Calif.L.Rev. 1353, 1384-1385 (1973); Orfield, The

Husband-Wife Privileges in Federal Criminal Procedure. 24 Ohio St.L.J. 144 (1963); Note, 1977 Ariz.St.L.J. 411; Note, 17 St. Louis L.Rev. 107 (1972); Note, 15 Wayne L.Rev. 1287, 1334-1337 (1969); 52 J.Crim.L. 74 (1961); Note, 56 Nw.U.L.Rev. 208 (1961); Note, 32 Temp.L.Qt. 351 (1959); Note, 33 Tul.L.Rev. 884 (1959).

[12]It is argued that abolishing the privilege will permit the Government to come between husband and wife, pitting one against the other. That, too, misses the mark. Neither Hawkins, nor any other privilege, prevents the Government from enlisting one spouse to give information concerning the other or to aid in the other's apprehension. It is only the spouse's testimony in the courtroom that is prohibited.

[13]"The rule of evidence we are here asked to re-examine has been called a 'sentimental relic.' It was born of two concepts long since rejected: that a criminal defendant was incompetent to testify in his own case, and that in law husband and wife were one. What thus began as a disqualification of either spouse from testifying at all yielded gradually to the policy of admitting all relevant evidence, until it has now become simply a privilege of the criminal defendant to prevent his spouse from testifying against him.

"Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny. Surely 'reason and experience' require that we do more than indulge in mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquility." Hawkins v. United States, 358 U.S. 74, 81-82, 79 S.Ct. 136, 140, 3L.Ed.2d 125 (concurring opinion) (citations and footnotes omitted).

[14]See Zorach v. Clauson, 343 U.S. 306, 325, 72 S.Ct. 679, 689, 96 L.Ed. 954 (dissenting opinion).

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PART II: LEGAL CASE HISTORIES AS A MODEL FOR EVALUATION CASE HISTORIES

The aim of the following discussion is to explore the possibility of evaluation case histories using legal cases as a model. An attempt will be made to explore a number of questions. What function could evaluation case histories fulfil? What might be the similarities and differences between evaluation and legal case histories? Might evaluation case histories be the same as evaluation reports? Who could write up an evaluation case history? Who could publish case histories?

A. THE POSSIBLE FUNCTION OF EVALUATION CASE HISTORIES

1. Evaluation Case Histories as Examples of How to Do Evaluations

The previous discussion of legal case histories contained the following statement: "For one who wishes to examine the real, practical application of recorded case histories to novel, unresolved problems, the common law legal tradition offers a superlative paradigm." One reason a legal case history is useful for solving novel, unresolved problems is that it provides an example of how to solve a particular problem. In the law, the problem is some legal issue. The problem in evaluation is to arrive at a judgment or judgments of worth. Judgments of worth are either made by the evaluator or the audience who read the evaluation report. In a similar way to legal uses, an evaluation case history would provide an example of how to solve some evaluation problem.

Comparison of Types of Cases. Why do legal case histories provide a model for evaluation case histories? One way to answer this question is to look at examples of cases from other subject areas. Mathematics and physical science textbooks typically give worked examples ("cases") of how problems are solved. These solutions follow logic and involve principles of mathematics and the physical sciences. A legal case history involves a set of principles to assist in deciding the legal issues, and logic is used in arriving at the legal decision. In a similar way for evaluation, methodological principles are used in the process of collecting the data. Presumably logic is used to arrive at value claims and recommendations, but this logic is rarely made highly explicit. Legal and evaluation problem solving is different from mathematics and physical sciences problem solving in that with legal and evaluation problems there is much more flexibility in arriving at a solution. In mathematics and physical science problem solving there may be just one and a very few ways of solving a problem. There is more flexibility in solving a problem in law, evaluation or engineering. Maybe this is because they are all less constrained by theoretical principles. Evaluation practice shows the most flexibility of all in solving a problem. Levine, M. and Levine, D. (personal communication, 1979) state:

> In our view, the fact that problem solving is flexible in evaluation means that the value choices are subtly made at the outset of the study in the apparently technical choices that are made in the design of the evaluation. For example, in a school setting, does the evaluator choose to focus on the children, the teacher, the principal, parents, school board, or the city council? Is the focus of the inquiry poor test results, discipline, parental concern with a child's progress, teacher qualifications, budgetary constraints, or a dozen other possible concerns? When one matter is

> studied, other aspects of the problem are not examined and made of equal importance with the variables that are studied. These are political as well as technical decisions.

The solution to mathematics and physical science textbook problems do not usually change with time. In contrast the solution to legal and evaluation problems must be in concert with the prevailing social mores which change over time. As was stated earlier: "The courts must frequently struggle with the inadequacy of principles developed in 18th century situations for present-day life." In a similar way with evaluation, value judgments made in relation to a certain situation may change over time in concert with changing social mores.

The business education case is another form of case. In contrast to a legal case, a business education case is a problem to be solved rather than a solved problem. An evaluation case could be either a solved problem or a problem to be solved. As with business, the latter would be used exclusively in evaluation education, and will be the subject of another monograph. The evaluation cases discussed in this monograph will, like legal cases, represent problems that have been solved.

The Need for Evaluation Case Histories as Examples. In relation to legal cases it was stated earlier: "Solutions to both simple and complex problems need not be developed afresh for each new case. Rather, principles are developed and applied to concrete but recurring fact patterns." In a similar way, evaluation case histories could provide examples of how evaluations were done so that solutions to the problems of carrying out an evaluation would not have to be developed afresh for each new evaluation as seems to be the situation now.

Evaluation case histories should prove to be valuable in the education of evaluators. There is indication (see Gephart and Potter, 1976) that evaluation students spend little, if any, time reviewing evaluation studies in a similar way that law students study legal case histories. It has been our experience that students in evaluation courses read few, if any, evaluation studies in the whole of their course work. Ideally students should spend more time doing evaluations, but this is often difficult to arrange.

The following are some examples of where example evaluation case histories would be useful.

(i) With the newer models of evaluation such as goal-free evaluation, responsive evaluation and advocate-adversary evaluation, there is a dearth, if not absence, of documented examples of the use of these models. Evaluation case history examples could remedy this situation.

(ii) Evaluation involves the evaluation of something. This something may include what could be called the four "P's"--programs, products, personnel performance and policy. Little is known about the differences in evaluating these four different types of entities. The development of evaluation case histories for each type may help to elucidate the differences and the similarities.

For each type, there are subtypes. For example there are different types of programs--a university course, an elementary reading program, a workshop, a conference and so on. There could be a series of evaluation case histories centered on each of these subtypes. As an example there could be a series of case histories on the evaluation of workshops. It has been our experience of the evaluation of workshops that everyone

starts anew and has no prior examples to guide them. One danger is that each situation to be evaluated is different and an evaluator should not be constrained by what has been done before.

(iii) Case histories could provide examples of the use of particular methodological techniques--how to overcome the difficulties of implementing a randomized experimental design, how to aggregate the information from a series of case studies, how to organize a questionnaire survey to obtain maximum response and so on.

(iv) Case histories could illuminate how to deal with issues that are a problem in many evaluations—how to negotiate a contract*, ethical responsibilities of the evaluator*, how to identify the most appropriate evaluation problems to be addressed, how to increase utilization and so on.

2. Evaluation Case Histories as Precedents

The written legal case history is more than an exemplar for future cases. In addition it acts as binding precedent, and thus makes the law fundamentally conservative. One reason for the precedential system of legal decision is that, according to one simple and fundamental definition of justice, people in similar circumstances should be treated similarly.

If evaluation case histories were written up, should they act as precedent? Should like factual circumstances lead to like judgments of worth? When there is a need for justice* to be served, then the answer to this question must be "yes." When persons are evaluated for job promotion or merit pay, like attributes and behavior should lead to like

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*However, with both these confidentiality is a problem.

judgments of worth. Some organizations (e.g., colleges) require documentation of a person's work history. An evaluation case history would contain such documentation (the facts), the principles (criteria) that were used in deciding on the person's pay or promotion, and how the principles were applied to the facts. At the present time it is not common in personnel evaluation for there to be any documentation of how the principles are applied to the facts. Thus for personnel evaluation, evaluation case histories could act as precedent in the legal sense.

However, according to Webster's Dictionary, there are two major meanings of "precedent" as a noun. One meaning is the legal meaning: "something done or said that may serve as an example or rule to authorize or justify a subsequent act of the same or an analogous kind." The other meaning is: "an earlier occurrence of something similar." It is this second meaning that could be applied to evaluation cases. An evaluation case could act as a precedent if it described something about an evaluation that had not occurred before. Thus an evaluation case history would be written up if it had some new aspect to it. This would result in the accumulation of knowledge and experience about evaluation.

3. Evaluation Case Histories for the Accumulation of Knowledge and Experience

Legal case histories, while recording legal decisions which will act as precedent, also act as a means of accumulating knowledge of the law. With regard to a particular topic, legal case histories record how the courts have dealt in the past with various situations relating to that

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*That is, people in similar circumstances should be treated similarly.

topic. Thus knowledge and experience in dealing with situations related to a topic accumulate over time.

In evaluation, there is no formal method for accumulating knowledge and experience about evaluation. This is a serious charge, since if it is true, this is detrimental to the growth and development of evaluation. The practicing evaluator certainly accumulates knowledge and experience about evaluation, but there is virtually no mechanism for passing this on to the profession as a whole.

In one sense the practice of evaluation is a private affair. An evaluator's clients and audiences may read the report he or she produces. However, the evaluator's colleagues rarely subject his or her work to scrutiny, such scrutiny being a mechanism for the accumulation of knowledge. Levine, M. and Levine D. (personal communication, 1979) state:

> The solution may not lie in the "case" idea, but in the notion of appellate review in law, or peer review in science. . . . Occasionally a client will hire a second expert to critically examine the evaluation report and help the client to decide the worth of the recommendations that are made in the report. We suggest that an independent professional review be incorporated in almost every evaluation, certainly whenever the client is unable to judge the professional worth of the work.

The main reasons why evaluators do not read one another's work is that evaluation reports (a) are not circulated widely, (b) are very lengthy, and (c) are not written for fellow evaluators. With regard to the latter reason, fellow evaluators are usually not interested in the details of the entity being evaluated but are interested in the methodology which is usually not given in a detailed form.

In other professions and disciplines besides the law, the commonest method of accumulating knowledge and experience is by means of journals

and books, including texts. With regard to evaluation there are a number of books available and, within the last two years, there has been an explosion in the number of journals devoted to evaluation. However, books and journals are not an entirely satisfactory way to accumulate knowledge and experience in evaluation. Evaluation is a practical activity and the outcome of that practical activity is the evaluation report. Thus much knowledge and experience of evaluation lies within evaluation reports. Virtually all evaluation reports are too large to be suitable for inclusion in journals and books, and it is questionable how satisfactory shortened versions would be. Thus much knowledge and experience of evaluation lies scattered throughout numerous evaluation reports and does not benefit the evaluation profession. Evaluation case histories are proposed as a way of remedying this situation.

B. DIFFERENCES BETWEEN AN EVALUATION REPORT AND AN EVALUATION CASE HISTORY

1. An Evaluation Case History Would be Shorter

Courts commonly keep records of everything that was said in court in relation to a particular case. Such a record would clearly be too long to read in its entirety if one were just trying to locate a case similar to the one he or she has to deal with. A legal case history has a brief summary of the case, including a short recital of the facts involved, the principles applied, and the result reached. Following this is the written opinion of the court on the particular legal issue.

A similar argument can be made for evaluation reports. They are usually just too long for an evaluator to wade through. There may be an executive summary in the evaluation report, but such a summary usually does not include methodological details which the evaluator is interested in. An evaluation case history would be much shorter than an evaluation report.

A legal case history might range from one page to twenty. The major criterion for a legal case history being written up is that it sets a legal precedent in some way. Legal precedent also determines how long a legal case history will be. If the case sets a major legal precedent, the judge will have to give a lengthy explanation for his or her reasoning. As already indicated, precedent (in the legal sense) would be important in those evaluation cases dealing with personnel matters but in other evaluation cases it would not be. However, an evaluation case history could be a precedent in the sense that it has some new, previously undocumented aspect to it. It would be this new aspect that would be the focus of the written evaluation case history, thus reducing it to a manageable length. Without some criteria for shortening it, it would be too long for ready use.

2. An Evaluation Case History Would be More Accessible

The fact that an evaluation case history would be much shorter than an evaluation report is in a sense one reason why an evaluation case history would be more accessible.

Because the efficient operation of the legal system clearly depends so heavily on the ready access to decided cases by the courts and by attorneys, a relatively thorough method of recording and categorizing those decisions has developed over the years. In contrast evaluation

reports mostly exist in the form of fugitive documents. They are not collected and categorized in a readily accessible form. Thus, in carrying out an evaluation, the evaluator often starts anew and there is no way in which the evaluator can build on what other evaluators have done before. Evaluation reports are not readily accessible but evaluation case histories, in collected, categorized form, would be.

3. An Evaluation Case History Would be Written for the Practicing Evaluator

An evaluation report is most often written for audiences which do not include the practicing evaluator who may be interested in aspects of the evaluation not included in the report. For example, the general audience is not usually greatly interested in methodology whereas this is of greater interest to the evaluator. In contrast the evaluation case history would be written for the evaluator giving information that would be most useful to his or her needs. Extensive details of the entity evaluated would be omitted since these would usually not be of interest to the practicing evaluator.

4. An Evaluation Case History Would Provide Explanation and Justification for the Evaluator's Actions

The court's opinion of the legal case history is written by the judge, usually with the aid of law clerks. The written opinion serves as both explanation and justification for the judge's action. In a similar way, an evaluation case history would provide explanation and justification for the evaluator's actions. At present this kind of information is rarely contained in an evaluation report. Yet it is the kind of information that would be enlightening to the practicing evaluator. It is a way knowledge and experience can be passed on from

one evaluator to another. It is a way knowledge and experience of evaluation can be subject to scrutiny. It is a way knowledge and experience of evaluation can accumulate.

A judge, in presenting the court's opinion, does not publically engage in self-evaluation of how the case was conducted. For example, there are no statements on how the judge would improve on the conduct of similar cases in the future. If a judge made such public statements, this would destroy the legality and creditibility of the judge's decision. However, the evaluator may have to be concerned about credibility but not legality. Thus the evaluator may feel some freedom to engage in some public self-evaluation of his or her work. This would be a form of meta-evaluation. Such meta-evaluation would be a way of passing on knowledge and experience to fellow evaluators.

C. WHAT INFORMATION MIGHT AN EVALUATION CASE HISTORY CONTAIN?

The format of the legal case history is as follows:

Name of Case
Case Summary
Headnotes
Opinion of the Court

The first three are part of the reporting and categorization system for cases and these three will be dealt with in a succeeding section. This section will deal with what might correspond to the opinion of the court.

A judicial opinion is divided into five parts and each will be discussed in turn:

1. The procedural history of the particular action;
2. A statement of the facts of the case;
3. A statement of the legal issues to be decided by the court;

4. A discussion of legal principles as set forth in prior decisions and now applied to the facts of the present case;

5. The result reached in the case.

1. The Procedural History

A legal opinion will state at the outset whether this action is before the trial court or before the court of appeals. Moreover, it will be stated whether one of the parties have asked for a decision as to only a distinct part of the case at the present time. If it is an appellate decision which is being reported, it will be carefully noted, not only which party won before, but also which issues have been preserved for review by the parties. This suggests that an evaluation case history report on prior evaluations (if any) and indicate if the evaluation issues in the present evaluation are the same or different from prior evaluations. The procedural history of a court action must be thoroughly set forth, because that procedure legally limits the issues presented to the court for decision at this juncture. Correspondingly, the aspects of the evaluation, which limit the evaluation issues dealt with by the evaluator, can be set forth. Examples of these aspects are as follows:

(a) The charge-negotiations-contract. The charge given the evaluator by the client including any restrictions placed on the evaluator in the negotiations and contract (if any) will limit the issues dealt with.

(b) The audiences. Who the audiences are and what are their questions will determine issues.

(c) The resources. Usually the evaluator only has resources to deal with a few major issues. Resources include money, time, and personnel to carry out the evaluation.

2. The Facts of the Case

A judicial opinion includes a presentation of the facts of the case. The facts of a case must be relevant to the legal issues of the case.

Not all cases are tried by a jury, but in those which are, the jury receives the evidence, evaluates it, and "finds the facts"—i.e., decides which version of the facts presented is the true version. The judicial opinion, then, will set forth the facts as found by the jury.

In a similar way, an evaluation case history would contain a statement of the facts as found by the evaluator. As with the law, the facts must be relevant to the issues of the case. For an evaluation, the facts are not decided by a jury but are a byproduct of the methodology used by the evaluator. If the evaluator has used an experimental-control design, the facts will be about measured outcomes. If the evaluator has used a responsive approach, the facts are likely to be about processes, transactions and human judgments. Hence, besides describing the facts, an evaluation case history should describe the methodology used by the evaluator.

The lawyer's presentation of a set of facts is governed by the rules of evidence. These rules have been developed to allow the tryer of fact to consider only evidence that is relevant, reliable, and not unduly prejudicial. The rules of evidence are also law. They are legal principles developed by the courts for their own use. Questions as to the admissibility of a given bit of evidence are frequently the subject of written judicial opinions.

In evaluation the rules of evidence or the knowledge claims are embedded in the methodology. This is another reason why the methodology used should be indicated. Evaluators have rarely considered the question of the admissibility of evidence that may be prejudicial in evaluating an entity but is not relevant to the issues under evaluation. As with the law, the question of the admissibility of a piece of evidence could be part of an evaluation case history.

3. The Issues

The legal issues are the focus of a court's decision. Stake and Easley (1978) explain what they means by an evaluation issue.

> An issue is a circumstance about which people disagree. It usually involves a condition having some features causing (or believed to cause) certain effects. These effects are valued differently by different people—so they disagree as to whether and how the condition should be changed.
>
> The ingredients for an issue, then, are the condition, the effects, the relationships between condition and effect, the different valuing, and the alternatives among courses-of-action for changing conditions.

Stake (1975) explains how he identifies issues and uses them. He also gives examples of issues.

> Instead of objectives, or hypotheses as "advanced organizers" for an evaluation study, I prefer issues. I think the word "issues" better reflects a sense of complexity, immediacy, and valuing. After getting acquainted with a program, partly by talking with students, parents, taxpayers, program sponsors, and program staff, the evaluator acknowledges certain issues, problems, or potential problems. These issues are a structure for continuing discussions with clients, staff, and audiences, for the data-gathering plan. The systematic observations to be made, the interviews and tests to be given, if any, should be those that contribute to understanding or resolving the issues identified.
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> In evaluating TCITY, a summer institute for high school students, Craig Gjerde and I became aware of such issue-questions as:
>
> Is the admissions policy satisfactory?
>
> Are some teachers too permissive?
>
> Why do so few students stay for the afternoon?
>
> Is opportunity for training younger teachers well used?
>
> Is this institute a "lighthouse" for regular school curriculum innovation?

What could correspond to the legal issues would be what Gowin (1979, p. 2) calls the telling questions of an evaluation. According to Gowin (1979) telling questions are the most significant questions of an evaluation and are few in number. They must be distinguished from technical questions. Telling questions "tell on" the context assumed or made explicit by the evaluation. Telling questions are not always found in evaluation studies; the only questions asked are technical questions. In some evaluations, telling questions are asked but not answered by the evaluations. Telling questions may not necessarily be made explicit in an evaluation study but may have to be inferred. In an appraisal of a Head Start evaluation, Gowin (1979) indicates that the telling questions are as follows.

(a) Are children who participated in Project Head Start better prepared for kindergarten than those who did not participate?

(b) Can racism in America be combatted through the means of schooling?

4. The Conceptual Principles

Legal principles, when applied to the facts of a case, result in a decision regarding the legal issues. The discussion of legal principles is central to the case opinion. The discussion is intended to be a logical, neutral exposition of legal principles, derived from precedent (or from the statutory text) and reinterpreted in light of the particular facts faced by the court.

It is not immediately clear what aspect of an evaluation study would correspond to legal principles. The use of legal principles involves logic and reasoning, and represents the conceptual side (in contrast to the factual side) of a legal opinion. Thus a discussion of the

conceptual aspects of an evaluation could correspond to the discussion of legal principles.

A discussion of the conceptual aspects of an evaluation could involve some of the following suggestions by Gowin (1979). An analysis of the key concepts of the evaluation study could be carried out. The telling questions themselves usually contain two or more key concepts. Some concepts will be more important than others. Some concepts will subsume others. It is possible to draw a concept map by arranging the concepts in an order with the most powerful ideas at the top of a sheet of paper and the subordinate ideas towards the middle of the page. The operational concepts, those closest to the events of interest in the evaluation, will appear toward the bottom of the page.

Under the conceptualization of an evaluation will fall assumptions. Usually an evaluator is forced to make several assumptions. An evaluation case would explicate the major assumptions of an evaluation.

The pattern of reasoning, the main arguments and the logic of the evaluation study can be explicated. There will be two types of claims made by an evaluation study--knowledge claims and value claims. The reasoning that leads to these claims can be discussed.

We believe that there is a logic of justifying value judgments or claims. This logic will be briefly discussed since such discussion rarely occurs in the evaluation literature. The discussion is based on a chapter by Coombs (1971).

When an evaluator makes a value judgment the evaluator makes a commitment to: (1) a value principle, and (2) a set of facts about the value object which shows that the principle applies to the value object. The facts and the value principle comprise the premises of a deductive argument having the value judgment as its conclusion. The value object

is the entity being evaluated. Making a value judgment commits the evaluator to a value principle because the evaluator's judgment logically implies a principle. If an evaluator says that a certain reading program is good, the evaluator makes a commitment to the value principle that any reading program like this one is good. It would be logically inconsistent to assert the judgment and to deny the value principle. The precise nature of the value principle implied by any judgment is indicated by the facts which are given to support the judgment. Suppose that an evaluator says this is a good reading program because the students improve on a test of reading achievement and become more interested in reading. If increased achievement and interest are what make this a good reading program, it follows that any reading program with these same features must be regarded as good. The value principle implied in any judgment relates the supporting facts to the evaluative term used in making the judgment. In the example above the value principle relates facts about achievement and interest to the evaluative term "good."

We know of no evaluation report that clearly sets forth the logic of the evaluative reasoning. The following example taken from Coombs (1971) is outdated but still an example of evaluative reasoning. Suppose an evaluator is trying to decide whether or not the U.S. ought to withdraw from the war in Vietnam. Suppose that the evaluator accepts the following facts (f) and criteria (c).

(f) 1. The war in Vietnam is primarily a civil war.

(c) 1. One country ought not enter into the civil wars of other countries.

(f) 2. U.S. withdrawal will result in a substantially reduced rate of killing.

(c) 2. It is wrong to kill or to cause a large number of killings.

(f) 3. U.S. withdrawal would reduce the level of civil strife in the U.S.

(c) 3. A stable, peaceful society is a good thing.

(f) 4. U.S. withdrawal would free U..S. resources which could be used to cope with pressing social problems in the U.S.

(c) 4. It is desirable for a society to have the resources available to handle pressing social problems.

(f) 5. U.S. withdrawal would result in a repressive, communistic society in South Vietnam.

(c) 5. Illiberal societies are undesirable and immoral.

(f) 6. The U.S. has committed itself to defending South Vietnam against takeover by the communists.

(c) 6. A nation ought to honor its commitments.

(f) 7. U.S. withdrawal would be construed as a sign of weakness and lack of resolve.

(c) 7. A nation ought not let others think it is weak or irresolute.

Suppose that the evaluator comes to the conclusion that the U.S. ought to withdraw from the Vietnamese war. Suppose that the evaluator comes to this decision on the basis of the first four facts listed above, and in spite of the last three. The evaluator's judgment implies a complex value principle to the effect that a nation ought not be involved in a civil war to save a country from a repressive government if that involvement increases the level of killing in the war and diverts the nation's attention from pressing social problems.

The facts used in arriving at a value judgment must be relevant. To be relevant to a value judgment, a fact has to meet two conditions: first, it must be a fact about the entity evaluated, and second, it must

be a fact to which the evaluator ascribes some value rating. This value rating is known as the value criterion. In the above example, each of the facts were about the U.S. and the war in Vietnam. In addition each fact had a value criterion associated with it.

What is the difference between a value principle and a value criterion? Value criteria are brought to and are involved in the making of the value judgment. A value principle emerges as a product of the value judgment. It is only after a value judgment has been made and the reasoning given for it that we know what value principle is implied by the judgment. Each value criterion provides the basis for evaluating one particular feature of the value object; each feature of the value object is evaluated separately. A value criterion does not provide the basis for evaluating the value object as a whole. In contrast, the value principle implied by the value judgment does apply to the value object as a whole.

In the law, Y set of legal principles, applied to X set of facts, leads to Z legal judgment. With evaluative argument, Y set of value criteria associated with a corresponding set of facts X, leads to Z value judgment which implies W value principle. The previous two sentences indicate the correspondence and contrast between legal argument and evaluative argument. Evaluative argument is rarely explicated in an evaluation report, but this could be done in an evaluation case history.

5. The Decision

The court renders its decision: Y set of principles, applied to X set of facts, yields Z result. Corresponding to the decision would be the answers given and claims made by an evaluation study. Gowin (1979, p. 2) suggests the following questions. What answers were given to the

telling questions? Which questions did the evaluator know he or she failed to answer? Which answers did the evaluator give to questions he or she failed to ask in the beginning? What critical limitations was the evaluator aware of? What claims beyond the original questions did the evaluator make?

Summary of Information an Evaluation Case Might Contain

The information that might be presented by an evaluation case history could be partly summarized under the acronymn, QUEMAC (Gowin, 1969). QUEMAC stands for a series of six questions that can be asked of any evaluation. These questions, when answered, give a sense of the whole structure of an evaluation study. This structure is the pattern of ideas or concepts showing what has to be thought about to make sense of an evaluation. QUEMAC is a form of meta-evaluation. The six aspects of an evaluation that QUEMAC stands for are as follows. In parentheses are shown the corresponding aspects of a legal opinion.

Q Questions (The Legal Issues)

U Unquestioned Assumptions (The Legal Principles)

E Event or Object Evaluated (The Facts of a Case)

M Method (The Facts of a Case)

A Answers/Claims (The Court's Decision)

C Concepts/Conceptual Structure (The Legal Principles)

What is missing from this six-point list is reference to procedural history. This needs to be in the information supplied by a case history The information supplied under the above six categories plus the procedural history should not be extensive. What should result is a brief, structured description of an evaluation. The writer of the case history should expand on anything that is new or unique to an

evaluation. Judges, with the possible aid of their law clerks, write up their legal case histories. Correspondingly evaluators can write up their evaluation case histories. However, QUEMAC is flexible enough that persons not associated with an evaluation can read the evaluation report and write up an evaluation case history.

D. THE USE OF CASE HISTORIES BY EVALUATORS

Practicing attorneys use legal case opinions in two distinct ways, for two distinct roles. First, to better serve his or her role as counselor, the attorney studies cases to ascertain what the law is. By determining how courts have dealt in the past with situations similar to that now faced by his or her client, and by seeking the guidelines and standards which the courts have set for conduct under similar circumstances, the attorney is better able to advise his or her client as to the proper course of action. Second, the lawyer uses case law somewhat differently in his or her role as advocate and adversary. The lawyer must evaluate the applicable case law dispassionately, analyze it thoroughly, and from its elements construct the strongest possible argument to support the client's position.

In a similar manner, there are two ways that an evaluator can use evaluation case histories. First, the evaluator can use case histories in negotiating with clients. Second, the evaluator can use case histories as examples for the planning and conducting of evaluations.

1. Using Case Histories in Negotiating with Clients

There are at least two ways that evaluation case histories can be used by an evaluator in negotiating with clients.

(a) As a Catalog of Possibilities. Suppose a client has a workshop that the client wants evaluated. Furthermore suppose the client is not clear as to the purpose of the evaluation other than the client thinks that, because of the expense involved, the workshop should be evaluated. The evaluator can familiarize himself or herself with case histories dealing with the evaluation of workshops and present various possibilities to the client. Assuming the client chooses one of the possibilities, the evaluator can use the chosen case history to give the client an idea of the type of evaluation that might be carried out.

One possible problem with this is indicated by Stake (1976). "One of the most surprising things to commissioners of evaluation is the fact that distinguished researchers cannot or will not switch their methods of inquiry. When one chooses an evaluator, one chooses a method of evaluating." The evaluator may not be prepared to present possibilities that use methods of inquiry which are not those of the evaluator. However, the evaluator may present the range of possibilities and indicate that these are certain possibilities that would require other evaluators.

(b) As an Indication of What is Feasible. As an example, suppose a client is prepared to spend a certain amount of money for the evaluation. Assuming the procedural history of evaluation cases contains indications of costs, then an evaluator, on the basis of previous cases, can present to the client what it is feasible for the evaluator to be able to do given the resources available. Previous case histories would help the evaluator decide what can be promised to the client.

The following are examples of information taken from previous evaluation case histories that might be useful in negotiating with a client.

(i) Purpose. Perhaps the most important question to be raised with a client is the purposes of the evaluation. For the client it may be no more than finding out what is good or bad and, of course, this is certainly the aim of evaluation. The goal-free evaluator would want to leave the discussion of purpose at this point. Other evaluators would want to know more specific purposes on the argument that this would increase the utility of the evaluation. These latter evaluators usually want to examine the range of pertinent questions with clients so as to allocate the usually modest resources for evaluation to the few questions that can be given primary attention. Prior evaluation case histories can be used to suggest possible pertinent questions. For example, if it is a workshop to be evaluated, prior evaluations can suggest where to look for weaknesses and problems. Prior evaluations can suggest what are important questions to ask in evaluating a workshop. However, the client should not be constrained in what he or she wants asked.

(ii) Resources. From prior evaluations with a given set of resources, an evaluator can indicate to the client what it will be possible for the evaluator to do. Alternatively, from prior evaluations, if a client specifies what is required in the way of evaluation, the evaluator can indicate what resources he or she will require.

(iii) Methods of Inquiry. It is reasonable to suppose that the evaluator will be the better judge as to which technique is most suitable for answering a question, at a particular cost, and at a particular level of credibility. However, a client often has ideas on what suitable methodology should be. This is where cases of prior evaluation studies would be useful. The evaluator could point out what he or she considered were examples of suitable and non-suitable approaches and indicate why he or she would choose a certain methodology.

2. Using Case Histories in Planning and Conducting an Evaluation

Earlier discussion emphasized the importance of case histories as examples especially for the planning and conducting of an evaluation. An evaluation case is a short, description of the actual case history. Thus an evaluator can quickly read an evaluation case history and decide whether the evaluation described is in any way a suitable model. If the evaluator decides that it is, then the evaluator may want further details than are given in the evaluation case history. For example, the evaluator may want copies of the instrument that was used. The evaluation case history should contain details of the availability and cost of the evaluation report as well as the name and address of the evaluator. This latter information may be useful in order to obtain information not given in an evaluation report.

The attorney facing litigation faces two tasks in presenting the client's case: firstly to prove the set of facts supporting the client's position, and secondly to argue which principles of law apply to those facts to produce a favorable result.

The lawyer's presentation of a set of facts is governed by the rules of evidence. Those rules have been developed to allow the trier of fact to consider only evidence that is relevant, reliable, and not unduly prejudicial. The rules of evidence are also law. In a similar way evaluation case histories could produce examples of what was meant by relevant, reliable and valid evidence. At the present time evaluation standards are being developed by the group effort of a number of professional organizations. Evaluation case histories could provide concrete examples of the application of these standards.

Once the facts are established, the attorney must argue the law applying to these facts. This is the primary area in which the attorney

uses case law. To argue the law means simply this: the lawyer contends that, given these established facts, these legal principles apply and yield this particular result. The measure of the lawyer's skill lies in the lawyer's ability to critically analyze prior statements of principle and application, and then to synthesize these elements into a logical, persuasive presentation of principle, application, and result in the matter to be decided.

An evaluation study makes two kinds of claims: knowledge claims and value claims. For either of these two kinds, evidence and logical argument must be the basis for a claim. The logic for such claims are rarely explicated. If the logic were explicated in an evaluation case, then this would clearly be an example to evaluators.

E. REPORTING AND CATEGORIZATION SYSTEM FOR CASE HISTORIES

Because the efficient operation of the legal system clearly depends so heavily on the ready access to decided cases by the courts and by attorneys, a relatively thorough method of recording and categorizing those decisions has developed over the years. In a similar fashion, if evaluation case histories are to be useful to the practicing evaluator, then a system of recording and categorizing case histories must be developed so that cases are readily accessible.

In the United States, the major reporting system for case opinions has been developed by the West Publishing Company, a private organization. It prints, in book form, case decisions forwarded to it by the various state and federal courts. In addition most states and the United States Supreme Court have a separate, official reporting system. Whether evaluation case histories would be printed by a commercial or

governmental organization is probably dependent on who was interested in funding such an operation. Some information systems are funded by commercial organizations, others by non-profit institutions such as professional associations and foundations (e.g., Smithsonian Science Information Exchange) and still others by government agencies (e.g., the National Institute of Education NIE funds the Educational Resources Information Center ERIC).

It is felt that it would be too expensive to print evaluation case histories in books as is done for legal case histories. A cheap, viable alternative is the use of microfiche. A microfiche is a 4-inch by 6-inch sheet of microfilm on which up to 96 pages of text are reproduced. Most libraries today have microfiche readers. Because microfiche is so inexpensive, it would be possible to not only put evaluation case histories on microfiche, but the original evaluation reports as well. In the initial part of a search for information, the evaluator would search the case histories. However, when the search became more focused, the evaluator may then want to look for details in specific evaluation reports. Of course, as the ultimate source of information, the searcher may want to contact the author of an evaluation.

How is it decided which legal case histories are published? West Publishing does not decide whether to report a particular decision. That function is exercised by various judicial administrative agencies, specially designated by the particular state or federal court system, which decides whether the issues presented and the decisions rendered are important enough to warrant publication. Each agency presumably develops its own criteria for publishable opinions. Those meeting those criteria are forwarded to the official publisher and to West Publishing. The

situation in the law is unusual in that the distributor (i.e., West) does not exercise control over what is entered into the information system.

With the ERIC system, there are at present sixteen clearinghouses, each responsible for a different subject area, which exercises control over what documents enter the system. One criterion of control is that a document must add something new to the data base. Of course this cannot be used as a strict criterion. Sometimes a document says something old in a fresh and valuable kind of way. Often a new idea has to be affirmed by a number of people before it is accepted.

West does provide certain additions to the opinion as written and delivered by the court. West's staff developes a brief summary of the case. It provides a quick, shorthand reference for legal researchers, who can see quickly whether the case is applicable to their problem and the result reached in that case. In a similar way it would seem advantageous for an evaluation case history to include a brief summary. The format of a legal case history is:

Case Name
Case Summary
Headnotes
Court Opinion

The headnotes form part of the categorization system. Headnotes are sentence-length statements of the principles of law discussed in the opinion. The headnotes are numbered, and those numbers are printed at appropriate points within the text of the opinion itself so that the researcher can quickly find the section of the opinion cited in the headnote. In an evaluation case history, value principles correspond to legal principles. Thus headnotes of the type described for legal case histories would not be appropriate for evaluation case histories.

West Publishing has developed a classification scheme according to the various areas of the law. Under this scheme, a particular legal topic is outlined and broken down into ever-smaller and finer sub-categories. For example, one major topic is Federal Constitutional law. Respectively smaller, outlined sub-categories would then include fundamental rights and privileges; specific fundamental rights; religious freedom; nature of the right; concept of the separation of the church and state. Each of these categories would include any number of sub-categories. The smallest outlined sub-categories are numbered, and are entitled keynotes. These keynotes correspond to the short phrase labels attached to the headnotes in reported case opinions.

What classification scheme might be suitable for evaluation case histories? Computer searchs of data bases are now becoming more and more a common occurrence. Such a data base is LEXIS which has been developed for the law. It would seem reasonable to make the classification scheme suitable for computer searching. There are four major types of evaluation which are somewhat different--program evaluation, personnel evaluation, product evaluation, and policy evaluation. Thus the information system could be divided into four major subfiles. These four categories would then be divided into sub-categories which are called descriptors in the ERIC system. Important descriptors would relate to the methodologies used and the nature of what was actually evaluated.

West Publishing prints a digest series. The digest prints the keynote classification system. Under each keynote are reprinted the headnotes from the cases reports. The ERIC system prints a monthly digest. This digest includes document resumes, a subject index, an author index, and an institution (where the document originated) index. It would seem appropriate for there to be a digest system for evaluation

case histories. Such a digest could contain case resumes, the entity evaluated index, an evaluator index, and an institution (affiliated with the evaluator) index. The following is a sample resume taken from the ERIC system.

The above have only been some preliminary suggestions on how evaluation case histories may be reported and categorized. If it was decided to set up a system of evaluation case histories, then some pilot experience would reveal what would be an appropriate reporting and categorization system. If a system of case histories was put into full scale use, then changes to categories would evolve over time to suit the needs of users. Is someone interested in funding a pilot scheme for the development of a system of evaluation case histories? The idea appears to have great potential value to practicing evaluators.

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ED 654 321
CE 123 456
Smith, John D. Johnson, Jane
Career Education for Women.
Central Univ., Chicago, Ill.
Spons Agency—National Inst. of Education (DHEW), Washington, D.C.
Report No—CU-2081-S
Pub Date May 73
Contract—NIE-C-73-0001
Note—129p.; Presented at the National Conference on Career Education (3rd, Chicago, Ill., May 15-17, 1973)
Available from—Campus Bookstore, 123 College Ave., Chicago, Ill. 60690 ($3.25)
Language—English, French
EDRS Price MF-$0.83 HC-$7.35 Plus Postage.
Descriptors—*Career Opportunities, Career Planning, Careers, *Demand Occupations, *Employment Opportunities, Females, Labor Force, Labor Market, *Manpower Needs, Occupational Aspiration, Occupational Guidance, Occupations, Vocational Counseling, *Working Women
Identifiers—Consortium of States, *National Occupational Competency Testing Institute, Illinois
Women's opportunities for employment will be directly related to their level of skill and experience but also to the labor market demands through the remainder of the decade. The number of workers needed for all major occupational categories is expected to increase by about one-fifth between 1970 and 1980, but the growth rate will vary by occupational group. Professional and technical workers are expected to have the highest predicted rate (39 percent), followed by service workers (35 percent), clerical workers (26 percent), sales workers (24 percent), craftsmen and foremen (20 percent), managers and administrators (15 percent), and operatives (11 percent). This publication contains a brief discussion and employment information concerning occupations for professional and technical workers, managers and administrators, skilled trades, sales workers, clerical workers, and service workers. In order for women to take advantage of increased labor market demands, employer attitudes toward working women need to change and women must: (1) receive better career planning and counseling, (2) change their career aspirations, and (3) fully utilize the sources of legal protection and assistance which are available to them. (SB)
Clearinghouse Accession Number.
Sponsoring Agency—agency responsible for initiating, funding, and managing the research project.
Report Number—assigned by originator.
Descriptive Note (pagination first).
Descriptors—subject terms which characterize substantive content. Only the major terms, preceded by an asterisk, are printed in the subject index.
Identifiers—additional identifying terms not found in the Thesaurus of ERIC Descriptors. Only the major terms, preceded by an asterisk, are printed in the subject index.
Informative Abstract.
Abstractor's Initials.

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